



**FSO (Suing as the next of friend and father to CDCS) v Kitengela International School AthiRiver & another (Petition E008 of 2023) [2024] KEHC 9999 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9999 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
PETITION E008 OF 2023**

**MW MUIGAI, J  
JULY 29, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA RIGHTS ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE PETITIONER’S CONSTITUTIONAL RIGHTS WERE INFRINGED**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF RIGHTS UNDER ARTICLE 19, 25, 28 AND 31 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**FSO (SUING AS THE NEXT OF FRIEND AND FATHER TO CDCS) ..... PETITIONER**

**AND**

**KITENGELA INTERNATIONAL SCHOOL ATHIRIVER ..... 1<sup>ST</sup> RESPONDENT**

**KITENGELA INTERNATIONAL SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

1. Vide a Petition dated 5<sup>th</sup> May,2023 the Petitioner herein sought the following reliefs from the court:
  - a. A declaration to be issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the petitioner’s child fundamental right to privacy and human dignity under Article 28 and 31 of *the Constitution* by



publishing the petitioner's child image for the purpose of commercial advertisement without the petitioner's consent.

- b. A declaration be issued that the respondent violated the petitioner's child's rights under article 30 of *the Constitution* by publishing the child's image and likeness for its own commercial gain with no personal financial advantage gained by the petitioner and his child.
- c. A declaration be issued that the petitioner's child's intellectual property rights, right of publicity and personality rights was infringed when the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents decided to publish the petitioner's child image in advertising and marketing the 1<sup>st</sup> respondent and or its ongoing admissions at the time of the financial gain without seeking authority or consent from the petitioner.
- d. An order of permanent injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from publishing and or using the petitioner's child image and likeness in their advertisement or promotion in any way without the petitioner's consent.
- e. An Order that the 1<sup>st</sup> and 2<sup>nd</sup> respondent be compelled to compensate the petitioner and or his child for damages and or loss arising from publication of the petitioner's child's photograph without the petitioner's express authority and the exploitation of the petitioner's child by the 1<sup>st</sup> and 2<sup>nd</sup> respondent's for financial gain.
- f. Cost of the petition be borne by the respondents.
- g. Such further and any other consequential orders, reliefs and declarations that this honourable court may deem fit and appropriate to grant for the purpose of enforcement of the rights of the child of the petitioner.
- h. An appropriate award of damages be granted to the petitioner for the violation of her.

## **Background**

2. The Petitioner instituted this Petition on behalf of his child who undertook his education at the 2<sup>nd</sup> Respondent until January 2023 when he was transferred to another school.
3. He averred that sometime in March 2023, it came to his attention that while his child was taking his education at the 2<sup>nd</sup> Respondent and particularly on Friday 22<sup>nd</sup> November 2019, the 1<sup>st</sup> Respondent published or caused be published the Petitioner's child's image/ photograph for the purposes of the 1<sup>st</sup> Respondent commercial advertisement on daily newspaper, advertising feature without the consent and authority of the Petitioner.
4. He lamented that this prompted him to conduct further investigations only to discover that the Respondents had made public commercial posts and advertisements using his child's image/ photograph elsewhere as well.
5. He contended that in continuance of the violation and infringement of the fundamental right to privacy and human dignity of his child, on 17<sup>th</sup> March, 2022, the 1<sup>st</sup> Respondent posted and or caused to be posted his child's image/photograph for the purposes of commercial advertisement on the respondent's social media platform via their Facebook handle name Kitengela International Schools once again without the petitioner's consent or authority.
6. It was opined that the main motive of using the Petitioner's child image was to commercially advertise the Respondents which would yield profits in terms of getting more students enrolling for admissions.



7. The Petitioner averred that at the time of instituting the petition, and despite having been issued with a demand letter, the respondents are yet to permanently withdraw, pull down, and delete the said Facebook post of his child's image/photograph on their social media platforms.
8. It was his position that the Respondent's action amount to tantamount violation and infringement of his child's rights under Article 30, right to privacy and human dignity and additionally his child's intellectual rights, personality rights were also infringed.

### **Replying Affidavit**

9. The Respondents on their Replying Affidavit dated 21<sup>st</sup> September, 2023 and filed in Court on 22<sup>nd</sup> September, 2023 sworn by Paul Mwangangi on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, wherein he deposed that they deny that they used the image of the Petitioner's child without his authorization and consent.
10. That the Petitioner in his application form for admission of the minor into the school expressly authorized the taking of moving or still images of the students during participation in programmed events and for use of the same by the respondent by appending his signature on the consents form on the said application.
11. That the use of the student's image was an express term of the admission contract between the Petitioner and the Respondents without which the Respondent would not have admitted the student.
12. He denied having made any financial gain from the use of the Petitioner's child image and that there was no proof of malice resulting to injury, damage or loss on part of the Petitioner or the student and that the elements of unlawful use of image has not been established.

### **Petitioner's Further Affidavit**

13. The Petitioner by a further affidavit dated 23<sup>rd</sup> January 2024 deposed that he did not sign the purported admission form particularly consenting to use of his son's image for the purposes of commercial advertisement and that the purported admission form produced had not been signed on every page thus casting doubt on its authenticity.
14. That the purported consent did not expressly give the respondents an approval to advertise them for commercial purposes using the minor's image.
15. It was further deposed that while the minor was a student at the 2<sup>nd</sup> respondent, his image was used to advertise the 1<sup>st</sup> respondent which is a different branch and even the school uniform was different from what was in the photo indicating that he was made to wear for the advertisement.
16. The matter was canvassed by written submissions however the Respondent did not file and serve his written submissions at the time of writing this judgment.

### **Submissions**

#### **The Petitioner's Submissions**

17. Petitioner in his submissions dated 23<sup>rd</sup> January, 2024 and filed in Court on 31<sup>st</sup> January, 2024 Counsel for the Respondent raised the following issues for determination:
  - a. Whether the use and publication/advertisement of the petitioner's child's image by the respondents for commercial gain without express consent was a violation of the petitioner's child's fundamental right to privacy and human dignity.



- b. Whether the use and publication of the Petitioner's child's image by the respondents for commercial gain was a violation of image rights, personality rights and intellectual property rights of the petitioner's child.
  - c. Whether the petitioner is entitled to injunctive orders against the respondents as sought in the petition.
  - d. Whether the petitioner is entitled to general damages sought
  - e. Whether the replying affidavit by the respondents is admissible as evidence
  - f. Who should bear the cost of the petition.
18. On Whether the use and publication/advertisement of the Petitioner's child's image by the respondents for commercial gain without express consent was a violation of the petitioner's child's fundamental right to privacy and human dignity, the Petitioner relied on article 31 of *the Constitution* on the right to privacy and the case of *Kuria v University of Kabianga (petition E002 of 2022)* in addressing the right to privacy.
  19. Reliance was also placed in the case of *Wanjiru v Machakos University Petition E021 of 2021* still on the right to privacy being a fundamental human right and the case of *Joel Mutuma Kirimi & another vs National Hospital Insurance Fund*.
  20. It was submitted that the petitioner did not give consent to the use of his son's image for purposes of the 1<sup>st</sup> Respondent's commercial advertisement and prayed that the Court finds this as a violation of the petitioner's child fundamental right to privacy and right to human dignity.
  21. As to whether the use and publication of the Petitioner's child's image by the respondents for commercial gain was a violation of image rights, personality rights and intellectual property rights of the petitioner's child, reliance was made to the case of *Wanjiru vs Machakos University (Petition E021 of 2021)* and the case of *NWR & another v Green Sports Africa Ltd & 4 others [2017] eKLR* on the definition of personality rights,
  22. On Whether the petitioner is entitled to injunctive orders against the respondents as sought in the petition, it was submitted that having established that the respondents violated the petitioner's child right to privacy, human dignity, personality rights and thus the petitioner is entitled to permanent injunctive orders against the Respondents.
  23. Reliance was placed in the case of *Wanjiru v Machakos University petition E021 of 2021* and *Kuria vs University of Kabianga Petition E002 of 2022* on whether the petitioner has established the conditions.
  24. Whether the Petitioner is entitled to damages sought, it was submitted that the petitioner had demonstrated that his child's right to privacy, human dignity, personality rights and intellectual property rights had been violated and thus the respondents should be ordered to compensate the petitioner's child for damages arising from publication of the Petitioner's child photograph without express consent or authority.
  25. Reliance was made to the case of *Joel Mutuma & another v National Hospital Insurance Fund [2020]* in the guidance of awarding of damages for violation of constitutional rights to dignity and privacy, the case of *Wanjiru vs Machakos University Petition E021 of 2021* where a nominal damages of Kshs 700,000 was awarded to the Petitioner, the case of *Kuria vs Kabianga University Petition E002 of 2022* where a sum of Kshs 500,000/- was awarded as general damages and the case of *N W R & another v*



- Green sports Africa Ltd & 4 others (2017) where an award of Kshs 750,000/- was awarded for general damages.
26. It was submitted that a sum of Kshs 2,500,000/- would be adequate as general damages based on the violations.
  27. As to whether the Replying Affidavit by the Respondents is admissible as evidence, it was submitted that the deponent of the Replying Affidavit had not demonstrated that he was duly authorized to swear the Affidavit on behalf of the Respondents and as such the Replying Affidavit was fatally defective, incompetent and should be disregarded and expunged from the court record.
  28. Reliance was made to Order 9, rule 2 (c ) of the Civil Procedure Rules 2010 and the case of Madin Clearing and forwarding Limited V Bamburi Supermarket Limited [2022] in addressing the issue of locus standi where the deponent did not have authority from the defendant company to swear an affidavit.
  29. It was submitted that the Respondents did not comply with the express provisions of order 9 Rule 2 (c ) of the Civil Procedure Rules 2010 and as such the replying affidavit by Mr. Mwangangi was inadmissible.
  30. On who should bear the cost, reliance was made to the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR to buttress the limb that cost follows the event.
  31. It was their final submission that the petition be allowed with costs having demonstrated that there were violations by the respondents on the petitioner's child right to privacy, human dignity, personality& intellectual property rights.

#### **Determination/Analysis**

32. I have carefully considered the pleadings and submissions for and against the petition.
33. The issue that arises for determination is whether the petitioner's child's rights to privacy, personality rights and intellectual rights were infringed and if so whether the petitioner is entitled to the reliefs sought.
34. The Petitioner averred that sometime in march 2023, it came to his attention that while his child was taking his education at the 2<sup>nd</sup> respondent and particularly on Friday 22<sup>nd</sup> November 2019, the 1<sup>st</sup> respondent published or caused be published the petitioner's child's image/photograph for the purposes of the 1<sup>st</sup> Respondent commercial advertisement on daily newspaper, advertising feature without the consent and authority of the petitioner.
35. Article 31(c) and (d) of [the Constitution](#) provides as follows: -31.Privacy:

Every person has the right to privacy, which includes the right not to have—(a)their person, home or property searched;(b)their possessions seized;(c)information relating to their family or private affairs unnecessarily required or revealed; or(d)the privacy of their communications infringed.
36. In Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR, Mativo J, held that;

“The right to privacy consists essentially in the right to live one's life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant



and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information give or received by the individual confidentially.”

37. The Judge traced the history of the said right when he expressed himself as hereunder:

“A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof. Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one’s image, likeness or persona include but are not limited to name, face, signature phrase, paraphernalia or action, costume or personals signature. The tort of misappropriation of personality was first introduced in Canada in the case of *Krouse vs Chrysler Canada*. The tort can be expressed by stating that every individual has an exclusive right to market, for financial gain, their personality, image and name, and that the law entitles an individual to protect that right, if it is invaded. The tort of misappropriation of personality can be invoked when all of the following four elements are met:

- a) There is an element of commercial exploitation of a person’s personality. There must be a sufficient link between the individual and the exploiting medium to establish that the plaintiff’s personality was “used” for the defendant’s commercial gain.
- b) The person is clearly identifiable in the medium used and to their respective community or communities.
- c) The person does not consent to the use of their personality.
- d) Damages, either emotional or financial losses, are proven although recent judicial rulings would indicate the right of privacy is recognized even in the absence of damages.”

38. In South African case of *Angella Wells vs. Atoll Media (PTY) Ltd & Anor*, Western Cape High Court Case No. 11961/2006 that:

“...the appropriation of a person’s image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in case, for the benefit of a magazine sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

39. The right to privacy was dealt with extensively in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others* [2015] eKLR where it was held that:

“285. The right to privacy is guaranteed under Article 31 of *the Constitution*.

286. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided



for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples' Rights.

287. B. Rossler in his book, *The Value of Privacy* (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

288. As to whether there is need to protect privacy, he goes on to write that: “Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

40. There is no doubt therefore that unjustified invasion of one's privacy is a violation of one's fundamental right and must be protected and where it is violated one is entitled to a relief. In this case, it is not in doubt that the Petitioner's child's images were taken and published and used by the respondents to advertise the school on ongoing admissions in bid to get more students to enroll in the school. Prima facie, that amounted to a violation of the Petitioner's right unless the said action can be justified by the Respondent. In *Karugaba vs. Attorney General* [2003] 2 EA 489 it was held that:

“The burden was on the Appellants to prove that the State or somebody else under the authority of any law has violated their rights and freedoms to publish guaranteed under the constitution. Once that has been established, the burden shifts to the State or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation.”

41. The contended that in continuance of the violation and infringement of the fundamental right to privacy and human dignity of his child, on 17<sup>th</sup> march 2022, the 1<sup>st</sup> respondent posted and or caused to be posted his child's image/photograph for the purposes of commercial advertisement on the respondent's social media platform via their Facebook handle name Kitengelainternationalschools once again without the Petitioner's consent or authority.

42. It was opined that the main motive of using the petitioner's child image was to commercially advertise the respondents which would yield profits in terms of getting more students enrolling for admissions.

43. The Respondents on their Replying Affidavit dated 21<sup>st</sup> September, 2023 and filed in court on 22<sup>nd</sup> September, 2023 sworn by Paul Mwangangi on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, wherein he



- deposed that they deny that they used the image of the petitioner's child without his authorization and consent
44. That the Petitioner in his application form for admission of the minor into the school expressly authorized the taking of moving or still images of the students during participation in programmed events and for use of the same by the respondent by appending his signature on the consents form on the said application.
  45. That the use of the student's image was an express term of the admission contract between the petitioner and the respondents without which the respondent would not have admitted the student.
  46. A look at the alleged application form that the petitioner is Alleged to have consented to clearly states that the images of the students are to be used during participation in programmed events. The images provided by the petitioner clearly show images of the petitioner child being used to advertise the school as dubbed "admissions ongoing". We can all agree that admissions ongoing is the business of the school administration and is not part of what can be defined as a school programmed event.
  47. To be fair, admissions is the administration affair to attract more students and thus make more profits by having more students enroll in the school. At the very least, this cannot be termed as a school programmed event being the defense of the respondent.
  48. Since it is admitted that the Petitioner's image was published, that was prima facie evidence of violation of his privacy. Accordingly, the burden shifted to the Respondent to justify that the limitations to the said right. Apart from bare averments, there was no evidence that the Petitioner or his child consented to the violation of his rights. In the premises, I have no hesitation in finding that the Petitioner's right to privacy was violated.
  49. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:

"...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated".
  50. It is therefore clear that by publishing the Petitioner's image being advanced for ongoing admissions, the Respondent violated the Petitioner's child right to dignity.
  51. As regards the damages, it is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In the instant case it was not established that the Respondent by virtue of advertisement obtained financial gain so that the Petitioner was not compensated for use of the image in advertising. Secondly, there was no evidence of proof of injury, loss or damage to the Petitioner. Therefore, nominal damages shall suffice.
  52. Based on the principles stated in M W K & Another vs. Attorney General & 3 Others [2017] eKLR, I hereby enter judgment for the Petitioner against the Respondent grant the following orders:
    - a. A Declaration that the Respondent violated the Petitioner's child's fundamental rights to privacy and human dignity under Articles 28 and 31 by publishing the petitioner's image for purpose of commercial advertisements without his consent.



- b. An order of permanent injunction restraining the Respondent from publishing and/or using the Petitioner's child's image and likeness in any way in its advertisements or promotions in any way without the Petitioner's consent and compelling the Respondent to stop any further advertisement or promotions featuring the Petitioner's image and likeness on their pamphlets.
- c. Kshs 700,000/- being damages for the violation of the Petitioner's child's right to dignity and privacy.
- d. Interests and costs.

**JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT ON 29/7/2024 AT MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

**In the presence of:**

Ms Oguwai for the petitioner – present

Geoffrey/Patrick – Court Assistant(s)

